THE ENGLISH REPORTS, 1292–1865.

II.

THE chancery reports are of comparatively recent origin. It is not until the last years of the seventeenth century that we have any satisfactory reports of the chancellors' determinations. Sir John Mitford (afterward Lord Redesdale), writing at the end of the eighteenth century, could still complain of the extreme scarcity of authority; and Lord Eldon, some years later, described Mitford's book as "a wonderful effort to collect what is to be deduced from authorities speaking so little that is clear." This slow development was the natural result of the auxiliary nature of the equitable jurisdiction and of the discretionary character of its early administration.

The judicial functions of the chancellor were the incidental outcome of his political power. Like the chief justiciar, whom he succeeded, the early chancellor was primarily a great officer of state. As an ecclesiastic he was likely to be more or less learned in the civil law, but his selection was due entirely to political considerations. The vast proportion of the early cases in chancery arose out of the violence and outrage which disturbed the administration of justice in the common law courts. An humble suitor deprived of his rights by a powerful adversary naturally appealed to the dignitary who wielded the whole executive power of the state. Although the chancellor's judicial functions had become very prominent by the end of the fourteenth century, they were entirely subordinate to and the result of his political station. Cardinal Wolsey, the last of the race of chancellors who combined both political and ecclesiastical power, was a typical example of the class; he was both prime minister and keeper of the king's conscience, and, secure in the former office, he ventured in the exercise of the latter to lengths which called general attention to the arbitrary nature of his power. Other causes, it is true, contributed to bring about a change. The original reasons for interference with the common law administration of justice had by this time become, to a large extent, obsolete. The strong central government established by the Tudors soon suppressed most of the internal disorder and violence that had flourished during the Wars of the Roses; and jurisdiction over such cases was thereafter taken

over by the Star Chamber. Moreover, as the common law became settled and more uniformly administered in accordance with recognized principles and precedents, it became necessary that equity should be administered in a more regular and systematic manner. The first step was obviously the employment of lawyers as chancellors, which began with Wolsey's successor, Sir Thomas More, and was regularly adhered to after the time of Lord Keeper Coventry. Under the Tudors and the first two Stuarts the professed basis of the chancellor's jurisdiction was the correction of the common law in cases where by reason of the universality and inelasticity of its principles injustice was likely to be done. Its great weapon was the writ of injunction. Lord Ellesmere, who is practically the first chancellor whose decrees have come down to us, is perhaps the most conspicuous representative of this period. His appointment was due to his professional acquirements; he did much toward settling the practice and procedure of the court; most of all, he successfully fought the great fight with Coke over the supremacy of the chancellor's writ of injunction. It was during the period from Ellesmere to the Restoration that the real foundation was laid of an equitable system modifying ancient common law principles and practices which no longer agreed with current views of justice.[1]

It is not to be expected, moreover, that much attention would be paid to the preservation of precedents in chancery so long as the chancellor's conscience was supposed to be untrammelled by definite rules. The general principles upon which the early chancellors were supposed to act were variously expressed by the terms conscience, good faith, reason, and, rarely, equity. But down to the reign of Elizabeth, at least, the chancellors' decrees were, as Blackstone says, "rather in the nature of awards formed on the sudden, *pro re nata*, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, for precedents." In his efforts to establish some sort of fixed practice Lord Ellesmere frequently

[1] Nevertheless, instances of specific relief under what became in after times the great heads of equity may be found at a surprisingly early day. The editor of the Selden Society's volume of Select Cases in Chancery gives the following list of the earliest cases: Accident, after 1398; account, 1385; cancellation and delivery of instruments, 1337; charities, after 1393; discovery, 1415–17; dower, 1397; duress, 1337; fraud, 1386; injunctions, 1396–1403; mistake, 1417–24; mortgage, 1456; partition, 1432–43; perpetuation of testimony, 1486–1500; rescission of contract, 1396–1403; specific performance, after 1398; trusts, after 1393; waste, 1461–67; wills, after 1393.

referred to precedents, but numerous instances of his vicarious charity reveal the latitude of his discretion ;[1] indeed, in the Earl of Oxford's case,[2] he expressly claimed the power to legislate on individual rights.[3] As late as the Commonwealth period Whitelock was led to decline the seals from an overwhelming sense of the personal responsibility of the office. "The judges of the common law," he said, "have certain fixed principles to guide them ; a keeper of the seal has nothing but his own conscience to direct him, and that is oftentimes deceitful. The proceedings in chancery are *secundum arbitrium boni viri*, and this *arbitrium* differs as much in several men as their countenances differ." Lord Nottingham's view that it was only with such a conscience as was *civilis et politica*, not *naturalis et interna*, that the chancellor had to do,[4] marks the beginning of modern conceptions.[5]

During all these centuries of development we have only a dozen small volumes of so-called chancery reports; in reality they are little more than brief notes on procedure. Of this sort are the cases collected by William Lambert and published under the name of Carey, their editor (1557–1604), which are mostly mere extracts from the registrar's books, and the so-called Choyce Cases in Chancery (1557–1606), consisting of a collection of notes of cases

[1] For instance: "The pitiful cries of the father and mother dying as aforesaid [they died of the plague] and of the poor orphans called to God for relief, and moved the heart of the Chancellor to take compassion upon them and to take such order as he hath done" (Cooper, Proc. in Parl. 5).

[2] 2 W. & T. 644.

[3] "The Chancellor is by his place under his Majesty to supply that power, *i. e.* of Parliament, until it may be had in all matters of *meum* and *tuum* between party and party ;" and he said "the cause why there is a chancery is for that men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet every particular act and not fail in some circumstances."

[4] Cook *v.* Fountain, 3 Swanston, 600. Nottingham drew his own portrait when he said of Hale, "He looked upon equity as a part of the common law and one of the grounds of it; and therefore, as near as he could, he did always reduce to certain rules and principles, that men might study it as a science and not think the administration of it had anything arbitrary about it."

[5] Lord Eldon's well-known declaration in Gee *v.* Pritchard, 2 Swanston, 414, marks the conclusion of the process of binding down the chancellor's discretion: "The doctrines of this court ought to be as well settled and as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot." Since Eldon's time the development of equity has been effected by strict deduction from established principles.

(mostly between 1576 and 1583), together with a little treatise on chancery practice. These two volumes contain brief records of many of Ellesmere's decrees. Tothill's meagre and imperfect notes extend from Elizabeth to Charles I. (1559–1646). These three collections, which are concerned principally with the reign of Elizabeth, give some idea of the matters dealt with in chancery; but they are extremely brief and unsatisfactory, often giving merely a bare statement of the facts of a case and the final decree, without any indication of the grounds of the judgment.

The seventeenth century reports are not much better. The volume known as Reports in Chancery (1615–1710) is made up mostly of notes of special cases from the reign of Charles I. Nelson (1625–93) records several cases decided by Lord Keeper Coventry, and a few by Littleton and the Parliamentary commissioners. The so-called Cases in Chancery (1660–90) is the best of the earlier reports; it gives in most cases a fair abstract of the chancellor's judgment, and a few cases are reported quite fully. Dickens's reports, which extend over a period of more than two hundred years, include some notes of cases as early as the sixteenth century. Freeman's notes (1676–1706) are unimportant.

In fact, the chancery reports prior to the Restoration are of secondary importance. The official records of the chancery, which begin in the seventeenth year of the reign of Richard II., afford a much more satisfactory and reliable guide to the early history of equity. A selection of these early records, from Richard II. to Elizabeth, has been published by the Record Commission under the title of "Calendar of Proceedings in Chancery."[1] The Selden Society proposes to carry on the work thus begun, and has already published its first volume, "Select Cases in Chancery, 1364–1471."[2] A collection of abstracts from the masters' reports and from the registrars' book, published by Cecil Monro under the title, "Acta Cancellariae, 1545–1624," further illustrate early

[1] This work is a sort of index to the vast mass of documents brought to light by the commission. In almost all cases, however, the printed volume gives the names of the parties, together with the purpose of the bill and a description of the property. The forms of equity pleading are illustrated by examples of bills and petitions in various reigns. The record consists of the bill, and after written answers were introduced, the answers and further pleadings, together with occasional reports of the examinations of defendants, copies of the decrees entered and of the writs issued.

[2] Lest it be thought that these records deal only with legal antiquities, it may be well to note the case (No. 23) of the poor herring hawker of Scarborough, who travelled up into Huntingdonshire and was there assaulted by his local rivals because he sold his merchandise below their rates.

practice, and serve to correct and supplement many of the reported cases.

The Restoration, or rather the chancellorship of Lord Nottingham (1673–82), marks an epoch in the history of equity. It is the starting point of modern equity, of which Nottingham has been justly called the "father." The interference of the chancellors had been instrumental in bringing about, through legislation and otherwise,[1] a steady improvement in common law practice and procedure, and the necessity for further intervention, except where there was an avowed divergence between the two systems, had become rare. Then the abolition of the incidents of feudal tenure by the Restoration Parliament introduced a system of real property which continued almost to the reign of Victoria. Controversies arising out of these new methods of conveyancing and settlement naturally found their way into chancery, where alone trusts were recognized, mortgages redeemed, and contracts specifically enforced; and the contemporaneous abolition of the court of wards ultimately turned the guardianship of the estates of infants into chancery. Moreover, the searching investigations which had been made during the Commonwealth exercised a powerful influence in the direction of reform in procedure. All these influences combined to form a new era in equity. Prior to the Restoration it could be said with entire accuracy that "the grand reason for the interference of a court of equity is the imperfection of the legal remedy in consequence of the universality of legislative provisions." But during the period from Nottingham to Eldon the chancellor was chiefly occupied with the adjudication and administration of proprietary rights. At the close of Lord Eldon's service equity was no longer a system corrective of the common law. Its principles were no less universal than those of the common law. It could be described only as that part of remedial justice which was administered in chancery; its work was administrative and protective, as contrasted with the remedial and retributive justice of the common law.

Lord Nottingham's very important chancellorship is covered by the folio volume entitled Reports temp. Finch (1673–80), which is made up of cases in which the reporter was counsel. The work is miserably executed; the statement of facts is defective, and there is only an occasional statement of the arguments; the report concludes with a mere abstract of the decree, without any refer-

[1] For example, the introduction of new trials with reference to the evidence and the enactment of the statute of frauds.

ence to the reasoning upon which it is based. The only reports at present available that do any sort of justice to the great chancellor's reputation are those published by Swanston in an appendix to the third volume of his chancery reports.[1]

The manuscript of Vernon's reports (1681–1720) was found in the study of that eminent lawyer after his death. Although these volumes constitute our first considerable collection of chancery cases, the reports are very brief and are often inaccurate; they are a most inadequate memorial of the labors of such distinguished chancellors as Nottingham, Somers, and Cowper.

The first clear and accurate chancery reports are those prepared by Peere Williams (1695–1736). These excellent reports cover a period during which eminent lawyers presided in chancery, and they have always been regarded as one of the classical repositories of equity. Their value has been enhanced by Cox's scholarly annotations.[2] Precedents in Chancery (sometimes called Finch's, 1689–1722), generally supposed to be the notes of Pooley, the reputed author of Equity Cases Abridged, is of fair repute. Gilbert (1705–27) is of little value. King's chancellorship is covered by the reports bearing his name (1724–34) and by Moseley (1726–30), neither of which is particularly good. Cases temp. Talbot (1731–37) is somewhat better. W. Kelynge (1731–36) contains notes of cases by both King and Talbot.

Of all the great lawyers who have administered equity Lord Hardwicke admittedly stands at the head. The desirability of an authentic collection of his perspicuous and invaluable opinions prompted an undertaking some years ago to reprint his cases, revised and corrected from original manuscript.[3] Unfortunately the work was abandoned after completing the first three years. Meanwhile our main reliance for Hardwicke's work is Atkyns (1736–54), Vesey, senior (1746–56), and Ambler (1737). These reports, although much improved in subsequent editions, are extremely unsatisfactory; their statement of facts is often defective, their reports of the arguments of counsel are far from lucid, and

[1] These cases were taken from the chancellor's note-books, which are said to record more than a thousand cases. It is to be hoped that we may one day have them in print.

[2] Peere Williams gives several special cases from the King's Bench. The distinction between common law and chancery is not strictly observed in many of the earlier reports. There are occasional chancery cases in the common law reports of Ventris, Salkeld, Fortescue, Comyns, Fitzgibbon, Strange, Kelynge, Ridgeway, W. Blackstone, Kenyon, and others.

[3] West (1736–39).

sometimes they give an incorrect report of the decree. Dickens's brief reports (1559–1798), which deal for the most part with the last half of the eighteenth century, are the work of a registrar of the court. Other decisions by Lord Hardwicke are scattered through 9th Modern, Ridgeway, Lee, Kenyon and Cox.

The services of Lord Keeper Henley are recorded by Eden (1757–66), and much more satisfactorily than by the brief and inaccurate reports of Ambler, which also extend through this period. Unfortunately, the second part of Ambler is our main reliance for Lord Camden's work. Most of Lord Thurlow's service is covered by Cox's perspicuous and accurate reports (1783–96). These volumes, which may be termed the first complete reports in chancery, also record part of Lord Loughborough's service as chancellor as well as Kenyon's decisions as master of the rolls. Brown's reports (1778–94), extending over part of the same period, are not so trustworthy; but they have been improved by the annotations of Eden and Belt. The first five volumes of Vesey, junior, cover the last years of Thurlow's service, all of Loughborough's, and include Sir Pepper Arden's decisions as master of the rolls.

Lord Eldon's herculean labors are preserved in some thirty volumes, of which the reports of Vesey, junior (1789–1816), record nearly one half. These very important reports were much improved by Belt's subsequent annotations and corrections. They contain also most of Sir William Grant's decisions as master of the rolls. Lord Eldon's other reporters are Vesey and Beames (1812–14), Cooper (1815), Merivale (1815–17), Swanston (1818–19), Jacob and Walker (1819–21), Jacob (1821–22), and Turner and Russell (1822–24).

The strong personalities of Lyndhurst and Brougham did not suffice to conceal their deficiencies in special learning, and their administration of equity, as recorded in Russell's reports, failed to add to their reputation. Lord Cottenham, on the other hand, was deeply learned in the principles and practice of the chancery jurisdiction, and the ten volumes of reports of his decisions by Messrs. Mylne, Craig, Phillips, Macnaghten and Gordon are among the most authoritative expositions of technical equity. But the twenty volumes of reports by De Gex and his several associates (1851–65) have probably been cited oftener in later times, and have carried more weight than any of the contemporary chancery reports. Their standing is not due entirely to the ability of the chancellors during this period, — although the list includes, besides Cranworth, Campbell, and Chelmsworth, such eminent equity law-

yers as St. Leonards and Westbury, — but also to the fact that they record the labors of Lords Justices Knight-Bruce and Turner in the Court of Appeal in Chancery.

The decisions of the masters of the rolls, which have been regularly reported in a separate series since 1836, are, as a whole, inferior to those of the vice-chancellors. Lord Langdale's work, as reported by Keen (1836–38) and Bevan (1838–66), is eminently respectable; but the last twenty-three volumes of Bevan's reports, containing Lord Romilly's decisions, have not been highly esteemed, although the labors of a very able bar supplied many deficiencies.

The seventy volumes of reports of the proceedings of the vice-chancellors vary considerably in authority. Beginning in mediocrity, they advance steadily in value. The work of the first vice-chancellors, Plumer and Leach, as reported by Maddock (1815–22) and Simons and Stuart (1822–26), carries little weight. The same may be said of Smale and Giffard's reports of Vice-Chancellor Stuart's decisions. The services rendered by their successors, Shadwell and Kindersley, reported by Simons (1826–52) and Drewry (1852–65), show much improvement. The labors of Knight-Bruce, as recorded in Younge (1841–43), Collyer (1844–45), and De Gex (1846–52), and of Wigram and Turner, in Hare (1841–53), were of a very high order, often outranking in the estimation of the profession the determinations of the chancellor himself. Probably the most substantial contribution to equity was made by Vice-Chancellor Page-Wood, whose very able discharge of the duties of this position led to his subsequent elevation to the woolsack as Lord Hatherley. The reports of Hare, Kay, Johnson, and Hemming from 1853 to 1865, covering most of his service as vice-chancellor, have probably been cited oftener than any other reports from this court.[1]

The ecclesiastical and admiralty courts and the appellate jurisdiction of the House of Lords and the Privy Council present no great difficulties. As a system of judicial precedents the ecclesiastical and maritime jurisdictions practically date from Lord Stowell's time; since then the proceedings of these courts have

[1] The decisions rendered by Lord Redesdale (1802–06) and by Lord St. Leonards (1834–35; 1841–46) as lord chancellors of Ireland, although not strictly binding on English courts, have always been cited with such deference that they have come to partake of the nature of authoritative precedents. Lord Redesdale is reported by Schoales and Lefroy; Lord St. Leonards in iv.–ix. Irish Equity Reports, and by Messrs. Lloyd, Goold, Drury, Warren, Jones and Latouche.

been quite fully reported. The judgments of the House of Lords during the eighteenth century are recorded by Brown and Tomlins; the reasons upon which some of these judgments are based may occasionally be found in the common law and chancery reports of the time. Complete reports of appeal cases date from 1812; since then, with a single break between 1825 and 1827, the judicial proceedings of the House have been admirably reported. Regular reports of the judicial proceedings of the Privy Council practically begin with the organization of the Judicial Committee.

The present method of systematic reporting dates from 1865. The "authorized" reports, conducted in each court separately as commercial undertakings, were costly and dilatory. Aside from frequent duplication in particular courts, several legal newspapers issued reports of their own which were cheaper, more prompt, and often superior to their rivals. This competition involved an immense waste of time, labor and money. At length, in 1863, a committee of the Bar devised the present system of coöperative reporting, which soon superseded the old reports. The regular reports are now issued under the general supervision of the Incorporated Council of Law Reporting, assisted by the General Council of the Bar.

Van Vechten Veeder.

41 WALL STREET, NEW YORK.